Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

In re MARTIN BETTWIESER

MARTIN BETTWIESER
Petitioner,
v.
COURT OF APPEALS 9TH CIRCUIT et,al
UNITED STATES DISTRICT COURT DISTRICT OF IDAHO et,al
Respondent,

PETITION FOR A WRIT OF MANDAMUS / PROHIBITION

MARTIN BETTWIESER
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208-336-8804

QUESTIONS PRESENTED

1.

Whether the Supreme Court should issue a Writ of Mandamus / Prohibition to the Court of Appeals 9th Circuit pursuant to Article 6 and Amendments 5 and 14 to the Constitution of the United States and the laws and statutes of the land and the facts presented from two different cases, from departing from the facts, case law and due process?

2.

Whether the Supreme court should issue a Writ of Mandamus / Prohibition to the United States District Court of the District of Idaho pursuant to Article 6 the 5th and 14th Amendments of the Constitution of the United States and the laws and statutes of the land and from the facts presented from a single case, from departing from the facts, and case law.

PARTIES TO THE PROCEEDINGS

Petitioner is Martin Bettwieser pro-se citizen of the United State of America.

The Respondents for Case #1 from the circuit court is the Court of Appeals 9th Circuit with officers Molly Dwyer, Gabriel Van Allen, Monica Fernandez, Circuit Judges B.Fletcher, Fisher, and M. Smith. Appellate Commissioner Peter Shaw.

Respondents for Case # 2 from the Court of Appeals 9th Circuit are Circuit Judges Alarcon, W.Fletcher and Rawlinson.

Respondents from the District Court is the United States District Court of the District of Idaho, District Judge William F. Downs sitting by Special Designation and the Clerks of the District Court.

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PETITION FOR WRIT OF MANDAMUS/PROHIBITION TO THE COURT OF APPEALS 9TH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pro-se petitioner, Martin Bettwieser here after referred to as Bettwieser, respectfully requests that the court grant and issue a writ of mandamus/prohibition to the Court of Appeals 9th Circuit to allow Bettwieser the opportunity to exhaust all appellate remedies and to give him access to the U.S. District courts and the Court of Appeals for the 9th Circuit as a pro-se litigant before any appeal for review is filed, if needed, that would be addressed to this court for review. Bettwieser further requests that the writ direct the court to abide by the Constitution, laws and statutes of the land based on the clear facts and law presented from its jurisdiction and to properly sign any judgments before it is filed and served.

Bettwieser further request a Writ of Mandamus/Prohibition to the United States District Court for the District of Idaho to abide by the Constitution, laws and statues of the land based on the clear and indisputable facts and law presented from it's jurisdiction and to allow access to the courts as a pro-se litigant.

OPINION BELOW

CASE NO. 2 Circuit Court

The order of the United States Court of Appeals for the the 9th Circuit of July 8, 2010, *Bettwieser v. NLRB 27 et al, No. 09-35760* granting in part Bettwieser's Motion For Clarification submitted April 26, 2010 and then stating that

"No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submission shall be filed or entertained in this closed docket." Appendix #1

The order of the United States Court of Appeals for the 9th Circuit of April 14, 2010 *Bettwieser v. NLRB Region 27; et al., No. 09-35760* summarily affirming the district Courts order. Appendix #2

The order of the Appellate Commissioner Peter Shaw of November 5, 2010 *Bettwieser v. NLRB Region 27; et al., No. 09-35760* Appendix 3

The order January 12, 2010 *Bettwieser v. NLRB Region 27; et al., No. 09-35760* granting Bettwiesers' motion for clarification submitted November 19, 2010 and denying Appellees' motion to dismiss. Appendix #4

The order or January 15, 2010 *Bettwieser v. NLRB Region 27; et al., No. 09-35760* from a motion attorney giving a different understanding of the proceedings. Appendix 5.

CASE No. 1 Circuit Court

The order of the United States Court of Appeals for the 9th Circuit filed April 26, 2010 *Bettwieser v. Lucas et al; No. 07-35964* denying Bettwiesers' Petition for Rehearing En-banc. Appendix #6

The order of the United States Court of Appeals for the 9th Circuit filed March 11, 2010 *Bettwieser v. Lucas et al; No. 07-35964* denying Bettwiesers' motion and memorandum for clarification and reconsideration of the courts order dismissing the appeal. Appendix #7

The courts Memorandum of the United States Court of Appeals for the 9th Circuit filed February 11, 2010 *Bettwieser v. Lucas et al; No. 07-35964* dismissing the appeal for lack of appellate jurisdiction. Appendix #8

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The Memorandum, Order and Opinion of the United States District Court for the District of Idaho, *Bettwieser v. Lucas et al; No. 06-CIV-0142-WFN* issuing a summary judgment ruling and opinion and order dismissing the case with prejudice. Appendix #9

United States District Court Orders filed December 15, 2008, Denying Plaintiff's Motions for Default Judgment and Granting the Defendant's Multiple Motions to Dismiss, of December 17, 2008 Terminating Case, March 30, 2009 Denying Motion for Reconsideration, August13, 2009 Denying Motion to Reconsider and Denying Motion for Extension of Time to File Notice of Appeal. *Bettwieser v. NLRB et al; No. CV-08-078-S-BLW.* Appendix 10-13

Letter and attachments from 9th Circuit Court Clerks returning a motion to extend the time to file a petition for rehearing en-banc. Appendix 14

JURISDICTION

This Court has jurisdiction to review the decisions and issue writ of mandamus/prohibition pursuant to *28 U.S.C Sec. 1651 and Rule 20* of the Supreme Court Rules of the United States.

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVLED

This case involves questions of the the *5th Amendment to the Constitution of the United States Constitution;*

Stating in part;

> " No person shall be.....deprived of life, liberty, or property without due process or law;

Also the *14th Amendment* which reads in part;

> " nor shall state deprive any person of life liberty or property, without due process or law; nor deny to any person within it's jurisdiction the equal protection of the laws."

And *Article 6 U.S. Constitution* which reads in part:

> " (2) This Constitution and the laws of the United States which shall be made in pursuance thereof..... shall be the supreme law of the land; and the judges in every state shall be bound thereby,"
> "(3) .....and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution;"

USC 28 sec. 1654;

> " In all courts of the United States the parties may plead and conduct their own cases personally or by council as by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

USC 28 sec. 2071:

(a) The supreme court and all courts established by Act of Congress, may from time to time prescribe rules for the conduct of there business. Such rules shall be consistent with the acts of congress and the rules of practice and procedure prescribed under section 2072 of this title

USC 28 sec 2072:

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of now further force or effect after such rules have taken effect.

USC 28 sec. 2074:

(b) Any such rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by congress.

9th Circuit Rule 3-6(b)

" At any time prior to the completion of briefing in a civil appeal if the court determines:

(c) that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order."

Federal Rule of Appellate Procedure 35(b)(c) and 36(a)

STATEMENT OF CASE

1. Course of the proceedings;

In April 2006 Bettwieser paid a filing fee and filed a complaint in U.S District Court for the District of Idaho against 3 individuals and employees of the United States Postal Service and the United States Postal Service, claiming in part that that defendant's were falsifying information under a FOIA request and withholding information requested and did not timely or adequately respond to the requests.

Summons were issued the same day and Bettwieser served the individuals by restricted certified mail. The court also served on Bettwieser an order of conditional filing pursuant to *USC 28 sec. 1915A,* screening, with a note that no summons would be issued, nor service effected until after review of the case had been permitted.

Bettwieser never heard from the court for approximately 6 months so I continued with service., The defendant's gave answer in November to the complaint through AUSA and included a motion to Dismiss which included evidences outside of the pleadings

Bettwieser filed procedural motions including a motion for default and to disallow AUSA as council for the defendant's.

After several more months of court inaction Bettwieser filed a request for the court to accept jurisdiction and rule on pending motions. The court responded by memorandum stating that the court didn't respond because it was thought that the filing fees were not paid. Bettwieser replied to the memorandum and to all the errors that that were occurring

and asked for corrections. The court instantly reassigned the case to a Senior Judge.

Bettwieser requested discovery but the court would not properly allow it until Bettwieser replied to the motion to dismiss, Bettwieser replied and shortly thereafter the court issued an opinion stating because it reviewed material outside of the pleading it was referenced as a summary judgement under *FRCP 12(b)(6)* dismissing the case with prejudice. App. 11 p.4.

In the courts ruling it made reference throughout the ruling to facts and law as presumptions and Bettwieser noted many errors in the facts and law. Bettwieser moved to reconsider and correct several times arguing that lack of discovery and attributed to the errors in facts and the errors in law were constitutional. The court dismissed the motions and Bettwieser timely appealed to the Court of Appeals 9th Circuit arguing in the district court and circuit court, among other things, that the district court lacked jurisdiction to dismiss the case for failure to exhaust administrative remedies with prejudice and that the court can't issue a summary judgement without adequate discovery and that a compilation of errors mounted to a constitutional violation.

With the appeal pending Bettwieser filed another complaint in the United States District Court for the District of Idaho in February 2008 what amounted to more injustices to Bettwieser by the USPS, the Idaho Rural Letter Carriers Association (IDRLCA) and individuals for continued harassment from Bettwiesers prior action and the NLRB Region 27 for it's part in the process.

Bettwieser served the individuals by restricted delivery certified mail. When the individuals didn't timely answer the summons Bettwieser filed a Motion for Default. on the

individuals for failing to timely reply. Shortly after that the individuals from the IDRLCA responded through an attorney stating that they were monitoring the case on pacer and when they saw the motion for default decided to appear and answer.

The history of the case was compounded by constant time violations or procedural violation of the law by the defendant's and errors by the court and was additionally compounded by the number of defendant's and appearance of separate councils. The Defendant's answered the complaint with a motion to dismiss and affidavits in support of the motion. Bettwieser had several motions pending with the court and the court set the matter for hearing on the motion to Dismiss and Bettwieser's motions for default and some procedural motions and assigned the case to a U.S. District Judge sitting by Special Designation.

At the hearing AUSA hand served Bettwieser an affidavit. Bettwieser objected and formally filed a objection of which AUSA amended it affidavit or which Bettwieser further objected. Before the court would rule in the objection it issued a ruling on the case as an "ORDER DENYING PLAINTIFF'S MOTIONS FOR DEFAULT JUDGMENT AND GRANTING THE DEFENDANT'S MULTIPLE MOTIONS TO DISMISS." Again the District Court Dismissed with prejudice, and issued a termination order a couple of days later. App. 10,11.

The court made reference to sanctions in the ruling App. 10 p.11-12 appearing to Bettwieser that the courts didn't want to deal with or recognize the constant violations, procedural or otherwise, of the defendant's or from the court and because Bettwieser had a previous case dismissed with prejudice but did not issue sanctions.

Bettwieser moved to reconsider that ruling and cited numerous errors in fact and in law and requested corrections know that the court among other things know that the previous case was in appellate proceedings and still based it's reference to sanctions knowing that the previous case may not maintain it's status as originally ruled upon.

The IDRLCA responded with a request to sanction Bettwieser. The court issued an order Denying Motion for Reconsideration on March 30, 2009. App 12. In the order the court gave category to a "Prohibition of Further Filings." stating that filing additional motions in this case may be "subject to the same conditions contained in this courts order dismissing his case." App. 12 p. 4.

There after Bettwieser timely filed a Motion to Amend Alter and Reconsider and to extend the time to file a notice of appeal knowing that response to such a motion could put filing a notice in jeopardy. The court responded on August 12, 2009 denying the motions with direction to the clerks of the court "that no additional motions may be filed in this case." App. 13 p.2

Bettwieser timely filed an appeal to the Court of Appeals 9th Circuit from the orders of the District Court of which both parties requested a transcript. The court issued a scheduling order with dates for completion of transcript and a briefing schedule.

The transcriptionist didn't file the transcript as per scheduling order. Soon thereafter the defendant's jointly filed a Motion to Dismiss Appeal. After 6 days the court issued a sua-sponta order limiting the scope of the appeal and an order to show cause why the appeal should not be summarily affirmed because the questions on the which the

appeal depended may be so insubstantial as not to justify further proceeding, App. 3

Bettwieser filed motions for clarifications after responding to the Appelles joint motion to dismiss if the court had already ruled on the Appelles motion. There seemed to be no communications between court officers because motion attorneys' were filing duplicate orders and motions of which Bettwieser needed to keep seeking further clarifications from the court. App. 4,5

Finally after all was staightened out and Bettwieser responded to the order to show cause Bettwieser argued, among other things, that the court never clarified which questions it was referring to in it's order of November 5, 2009 and never cited what the questions were it was referring even though it granted Bettwiesers' Motion for Clarification. App. 3,4,5, Bettwieser gave citation that in order to summarily decide the appeal there needed to be a proper appeal record which consisted of an opening brief and transcript.

In the mean time the Court of Appeals ruled on Case No. 1 form Bettwiesers previous appeal. App. 8 . Although it did not rule on the merits of the case as presented it gave dicta that the case could not be dismissed with prejudice. This nullified any justification of even commenting on sanctions as an issue in either case before the District Courts and Circuit Courts. Even under that decision Bettwieser still needed to motion the court to reconsider it's decision to address more or the merits when the facts that were used in or to reach a decision in the memorandum were mis-cited and misrepresented. Court denied that motion, App.7 and subsequetly denied a petition for rehearing en-banc on April 26, 2010 App. 6

In the mean time the Circuit Court in case No. 2 dismissed the appeal and affirmed the decisions of the District Court citing the same citation that Bettwieser gave as authority that there must be a transcript and opening brief to have authority to issue a summary disposition on appeal. App. 2

Bettwieser moved to clarify how it's ruling could differ from the authority cited. The circuit court granted the motion in part and stated because a transcript was not needed because the appeal was from a post judgement ruling but also made no reference to the opening brief and only cited *Ninth Circuit Rule 3-6* as authority. App 1

Bettwieser subsequently filed a motion to extend time to file a petition for rehearing en-banc of which was returned by the clerk of the court with a copy of the App.1 highlighting the that no more submissions were to be filed in this case with a letter and returning Bettwiesers motion. App 14 p.1-5 Neither of the judgments of the court are signed.

REASONS FOR GRANTING THE PETITION

To my knowledge the United States Supreme Court has never granted a petition of a pro-se litigant that was drafted and presented by a pro-se litigant and presented to an appellate court nor has the U.S. Court of Appeals. On average about 25% of cases are presented by pro-se petitioners to Courts of Appeals. By granting this petition the court is declaring that it does allow pro-se citizens as another voice of the people for the Constitution and not just the Timothy McVeighs and Attorneys of the world.

Bettwieser requests this court to grant his petition, because the lower courts have departed to far from accepted

precedence and law and if left as is, creates a public record that is not accurate, or just, as it is docketed in the courts and would set precedence to wrong legal theories and wrongful fact findings and would give the legal community as well as the general public false precedence and would further defame or defraud Bettwiesers' character through out written history from a false and inaccurate account of the facts and law that were presented. Further more if not corrected would not allow him or any pro-se litigant the same access to the courts as attorneys or equal protections under the law to present or vindicate those wrongs.

With the age of electronics the court needs to address the issue of electronic generated materials that are being created and sent over the computer and then hard copied and sent out as served as court orders judgments or dipositions. Signings of orders and dispositions of the court has been eliminated which gives the impression that the disposition of all the courts business and orders are under the discretion of and drafted by the clerks and not the judges or justices and by granting the writ the court can exercise it's supervisory authority in this area as well as addressed herein.

By not granting the petition would send the message that when a pro-litigant has to be critical of a court to preserve the issue on appeal that it would be ok for the courts to accept that a pro-se is just an annoyance and so the courts can act biased toward the pro-se litigants case and issues and that they can unjustly deal with that litigant or abuse it's discretion.

By granting the petition the Supreme Court can real the lower courts in from straying from stare decisis the law and injustice against pro-se litigants, and stop the covering up of mistakes and injustices of the law clerks and send the message that the courts are supposed to be available and equitable to all citizens for justice and equity relief.

ARGUMENT ON QUESTIONS PRESENTED

QUESTION #1and 2
Writ of Mandamus/ Prohibition to the Court of Appeals for the 9th Circuit and United States District Court, for the District of Idaho

STANDARD OF REVIEW

The Court has observed that the writ has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of it's prescribed jurisdiction or to compel it to exercise it's authority when it is it's duty to do so. *Will v. U.S. Supra, 389 U.S. at 95, 88 S.Ct at 273 quoting Roche v. Evaporated Milk Assn. 319 U.S. 21, 26, 63 S. Ct. 938, 941 87 L. Ed. 1185 (1943) Kerr v. United States District Court 426 U.S. 394*

In this instant case Bettwieser is seeking the Supreme court to compel the Court of Appeals for the 9th Circuit to abide by the settled law and the facts presented in this case and allow Bettwieser to file a petition for review en-banc. and to compel it to sign any final orders or judgments, and to issue any other order or direction for the courts correction for ignoring the law or case history. The Court of Appeal has denied Bettwieser to file any more paper in the court before he has exhausted that courts avenues or given him any due process before issuing that order.

For the United States District Court for the District of Idaho Bettwieser seeks the Supreme Court to compel the District Court to allow Bettwieser to file suits or motions in the court unrestricted absent from any showing that such actions are justified and absent from any opportunity of the court to give Bettwieser notice of due process and an

opportunity to respond before any sanctioning can be imposed, and to abide by the law and precedence and any other order the Supreme Court is compelled to issue as a exercise of it's supervisory capacity.

The conditions the court has set out for issuance of a writ for mandamus and prohibition are;

1. That there are no other adequate remedies.
2. That it is clear and indisputable

See *Roche* above.

Referencing # 1, there is no other adequate remedy;

There is no adequate remedy to allow Bettwieser to file pro-se in the Court of Appeals or District Court. Bettwieser has gone through the grievance process, the NLRB, the District Court the Circuit Courts but now is denied the final process in the Court of Appeals to appeal en-banc before being appealed to the this court for review. Appendix 14 p. 1-3 Appendix 6 p. 2 Appendix 13 p.2

The case history is clear that sanctions of such a nature can not take place without due process and an opportunity to oppose the sanction. *Delong v. Henessey 912 F. 2d 1144 and In Re Oliver 652 F. 2d 443, 446* that litigiousness alone would not support restricting filing activities and there needed to be numerous suits. Oliver had 51 Bettwieser only had 1 previous that essentially was reversed on appeal in his favor.

Referencing #2. that it is clear and undisputable.

Background;

The adverse history that Bettwieser has had with the Defendant's and Courts from the beginning was the

intentional procedural and factual errors with the Defendant's that spilled over into the courts following the same path. The cases ended up being more over those issues than the complaint. (See Case History on Pacer for Appeal Court No. 09-35760 and 07-35964 District Court No. CV-06-142 WFN and 1:08-CV-0078-BLW) and from there Bettwieser was not given just access to courts through discovery or it's rulings and was considered more just an annoyance.

When a person makes a claim upon another that a wall is black and shows the other person that the wall is black and the other person states that the wall is not black but white it can not only be asserted that the person is in error but that the error is intentional and that the other person has a biased agenda which is intentional error. In this instance it can be recognized that the other person had departed so far from the usual coarse of proceedings or correctness and was pointed out by the person, that the other person acted in way that would imply not only an adverse agenda but constitutional and statutorial violations and has to cover it up which leads to those violations. At this stage a third party must step in and exercise it's supervisory power to over come that bias.
Courts have ruled that a collection of errors constitutes a manifest injustice and is unconstitutional. *Davis v. WoodWard 384 F. 3d 628 (Cal) (2004) and Harris v. Wood 64 F.3d. 1432, 1438 (9th Cir. 1995)* although the reasoning was in a criminal action the reasoning can surely apply in civil.

Bettwieser has identified many points of error in fact and law that were made by and in District Courts and Court of Apeals 9th Circuit and are to many to supply in this petition but the record is available for review on a whole electronically and through the respective courts, but Bettwieser can give some examples of clear error and indisputable for emphasis.

First, in Appendix 9 the District Court issued a summary judgment pursuant to *FRCP 12(b)(6)* and dismissed with prejudice. Bettwieser sought reconsideration from the court with citation and authority that discovery was to be had *Celotex Corpl v. Catrett 477 U.S. 317,106 S. Ct 2548* before the court could issue a summary Judgment proceeding and that the case can not be dismissed with prejudice.
Reiter. Cooper 507 U.S. 258 (1993) , the court still denied.

The case was appealed and the 9th Circuit in it's ruling changed the way the District Court ruled and stated the District Court dismissed under *FRCP 12(b)(1)* and was not a summary judgment ruling and so would not rule on the merits. Appendix 8 but it is clear and indisputable that the District court stated " the motion will be treated as a summary judgement motion" and the defendants were seeking it under FRCP 12(b)(6). Appendix 9 p.4 They dismissed the appeal and left the District Courts order with prejudice in place even though in dicta it noted that dismissal with prejudice was not justified. Petition for clarification and rehearing en-banc denied. Appendix 6,7

Second. The District Court in case Appendix 12 p.4 stated that it had previously prohibit him from filing employment related law suits which is contrary to the previous order, Appendix 10 p.12. which stated that sanctions were not required. Misstating facts to achieve a purpose and objective must be interpreted as a statutorial and constitutional violations.
The Ulitmate Injustice: When the Court Mistakes the Facts, 11 Cardozo Law Review 1313 , 1346-48 (1990)
These misstated facts and law are then a part of record and then become precedence for another case and that case is then further misstated to reach the conclusions of that case, eventually you have a record that is so political and perverse as to justify any future immoral or unjust legal outcome.

I'm am referencing to an incidence to Bettwieser in Appendix 10-13. Bettwieser served the summons to all parties including the individuals by restricted certified mail. The individuals were served first. They never timely responded to the summons. Bettwieser filed a Motion for Default on the individuals. A few days later they responded in opposition to the motion stating they weren't properly served with the summons but stated they were monitoring the case on Pacer. The attorneys had the summons but deliberately didn't respond to the summons until they felt they could be sanctioned.(see electronic case history for District Court) To justify there contention they cited a case from the District Court stating that certified mail was not proper service. *Ivy v. Mason, 30 F. Supp. 2d 1268, 1271 (D. Idaho 1998)* of which the judge accepted in it's decision.. Appendix 10 p.5. Now this broad statement is used to misinterpret the fact and circumstance behind both cases.

In the first instance Bettwieser pointed out to the court that in *Ivy* it didn't involve restricted delivery which means it is personally delivered to the party only, and that Idaho law has defined personal delivery as "delivering personally" as actual delivery. *Brooks v. Orchard 21 Idaho 212* (District Court Doc. 63 and 68) and that when copies of the service record of *Ivy* were provided as exhibits to the court for review it showed that the defendants that were served in *Ivy* were not the ones that signed for the mail, that the certified mail was just delivered to P.O. Boxes and that some of return reciept were not signed at all as received.. The conclusion that can be reached is that citations and authority in District Courts decisions do not reflect the actual facts that relate to issues such as certified delivery as in this case. This causes and accelerated injustice when it is applied to Bettwieser's case because that broad statement does not reflect the facts of the case or Bettwiesers case. When another case comes along that is similar, Bettwiesers case

may be cited in error to a different set of facts that are different and decision of that case will be misjudged and now can be accelerated to the next case and next and so forth until there is a total break down of the rule law where the judges themselves become the law, and the stare decisis the constitution, and statutes are of no force. I am sure that this has to be contrary to the Statutes and Constitution. The facts particular to such a broad statement that certified mail is not allowed must be accompanied with a precedence setting ruling.

Thirdly, Court of Appeals issued and order to show cause, after a review of the why the appeal shouldn't be summarily affirmed because the questions upon which the appeals lies are so insubstantial as not to warrant further proceedings. Appendix 3. Bettwieser moved to clarify of which questions it had referred to. The court granted the motion but did not specify which questions if was referring to. Appendix 4
Three days later a motion attorney grants the same motion but words the Appendix 3 order with different wording with different meaning. Appendix 5
Bettwieser responded that a summary judgment disposition or questions of insubstantiality cannot be affirmed with out a proper record which includes an opening brief and a transcript that was requested by both parties.
U.S. v. Hooton 693 F.2d 857 Pages v. U.S. C.A. 9(Cal) 1966, 357 F.2d.337,339 (FN1)

Bettwieser requested the court to allow an opening brief and issue an order to compel the transcript because the transcriptionist did not file it as per the scheduling order or as ordered by the parties. The Appellees didn't object to Bettwiesers response. The court summarily affirmed and cited the authority from the same citation Bettwieser gave that an opening brief and transcript first had be reviewed. Appendix 2 and on clarification stateing a post judgement

motion is not entitled to a transcript. Appendix 1. but made no comment on as far as an opening brief and then sanctioned from any further filings. Appendix 14

SIGNING OF DOCUMENTS:

Before the computer age court documents were signed by the court.

Bettwieser has dealt with courts enough to know that there are many communications between attorneys and the court clerks that are not part of the record and drive the agendas of the courts through the clerks. With that observation it must also be observed that orders and judgments are not dated or signed or may have an electronic signature. See Appendix 1-8, 10-12, 14.

With the age of electronics the court needs to address the issue of electronic generated materials that are being created and sent over the computer and then hard copied and sent out as served as court orders judgments or dipositions. Signings of orders and dispositions of the court has been eliminated which gives the impression that the disposition of all the courts business and orders are under the discretion of and drafted by the clerks and not the judges or justices and by granting the writ the court can exercise it's supervisory authority in this area as well as addressed herein.

State Court rules are more specific on dating and signing of documents and the Federal Rules a little more general

although it is addressed. *FRAP 36* calls for the signing of the document before it is entered. Dates and Signatures on documents are at the heart of the legal structure. I understand that the courts are busy but it would seem that absence of those basic procedures burdens the courts more. I also brings into question the validity or credibility of the

document. With so many errors in Bettwieser cases it is wondered if was assigned to a law student for disposition. I would also bring to accountability the right party to address when issues are questioned.

CONCLUSION:

The court must see that there is no other adequate remedy to obtain relief that Bettwieser can pursue and that it is clear and indisputable.

With this petition being presented in a pro-se manner the court must still conclude that there is enough facts and argument to support that the District Court and Circuit Courts acted or didn't act as they were supposed to and misstated facts and the law, misapplied the facts and law to achieve an outcome that deprived Bettwieser of his constitutional and statutory rights and that this court can take jurisdiction and exercise it's supervisory authority and issues a Writ of Mandamus/Prohibition to the District Court to prohibit it from enforcing the order and mandate or the District court to issue an order to show cause why the sanctions that were stated should be imposed. It should further be directed to correct misapplied law to the standard of stare decisis, statutes and constitution and the facts presented, with instructions for future pro-se litigant case handling and management and in general to right or correct any wrongs.

Bettwieser requests the same Writ for the Court of Appeals for the 9th Circuit with addition to compel the court to allow Bettwieser to petition the court en-banc on the issues and that the documents in the court should be dated and signed before entry.

Respectfully,
Honorably,
Honestly, submitted.
Martin Bettwieser
Pro-se Petitioner
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the PETITION FOR A WRIT OF MANDAUMUS/PROHIBITION to be served by pre-paid first class mail on the 6TH day of October, 2010 to the following

Court of Apeal Justices 9th Circuit:
B. Flectcher, Fisher, M. Smith, Alarcon, W.Fletcher, Rawlinson and others Peter Shaw, Molly Dwyer, Gabriel Van Allen, Monica Fernandez
P.O Box 193939 (415) 355-8000
San Francisco Ca. 94119-3939

United States District Court for the District of Idaho
Williams F. Downs sitting by Special Designation for the District of Idaho:
Clerks of the District Court.
Federal Building
550 W. Fort St. (208) 334-1074
Boise,Idaho 83724

Martin Bettwieser

FILED

JUL 08 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 09-35760
Plaintiff - Appellant,	)	D.C. No. 1:08-cv-00078-BLW
v.	)	District of Idaho, Boise
NLRB REGION 27; et al.,	)	ORDER
Defendants – Appellees.	)	

Before: B. FLETCHER, FISHER and M. SMITH, Circuit Judges.

Appellant's motion for clarification of the court's April 14, 2010 order summarily affirming the district court's post judgment orders is granted in part. Pursuant to the November 5, 2009 order, the scope of the court's review was limited to the review of the district court's August 13, 2009 and March 30, 2009 orders denying appellant's motions for reconsideration. The court reviewed the record of the district court proceedings in this action, which is available for

SVG/Pro Se

electronic review on the PACER system, and all filings by appellant in this court in this appeal. No transcripts were necessary because there were no hearings involved in the resolution of appellant's post-judgment motions. Court rules permit the court to summarily affirm an appeal prior to the filing of an opening brief if the appellant is given notice and an opportunity to respond, both of which were provided in this appeal. *See* Ninth Circuit Rule 3-6.

To the extent appellant seeks reconsideration of the court's April 14, 2010 order, such relief is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

SVG/Pro Se

FILED

APR 14 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 09-35760
Plaintiff - Appellant,	)	D.C. No. 1:08-cv-00078-BLW
v.	)	District of Idaho, Boise
NLRB REGION 27; et al.,	)	ORDER
Defendants - Appellees.	)	

Before: B. FLETCHER, FISHER and M. SMITH, Circuit Judges.

A review of the record and the response to the January 12, 2010 order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

SVG/Pro Se

Accordingly, we summarily affirm the district court's orders denying appellant's motions for reconsideration. All pending motions are denied as moot.

AFFIRMED.

FILED

NOV 05 2009

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 09-35760
Plaintiff - Appellant,	)	D.C. No. 1:08-cv-00078-BLW
v.	)	District of Idaho, Boise
NLRB REGION 27; et al.,	)	ORDER
Defendants - Appellees.	)	

Before: Peter L. Shaw, Appellate Commissioner.

On December 17, 2008, the district court entered an order dismissing this case. On December 26, 2008, appellant filed a motion for reconsideration, which was denied on March 30, 2009. On April 16, 2009, appellant filed a second motion for reconsideration, which was denied on August 13, 2009. On August 18, 2009, appellant filed a notice of appeal, which was timely only as to the August 13, 2009 order denying appellant's second motion for reconsideration and the March 30, 2009 order denying appellant's first motion for reconsideration. *See Swimmer v. Internal Revenue Service*, 811 F.2d 1343 (9th Cir. 1987) (second motion for

CO/Pro Se

reconsideration does not toll time to appeal underlying judgment).

Because the August 18, 2009 notice of appeal was not filed within 30 days after entry of the December 17, 2008 order, the scope of this appeal is limited to review of the March 30, 2009 and August 13, 2009 orders denying appellant's first and second motions for reconsideration.

A review of the record demonstrates that this appeal may be appropriate for summary disposition because the questions on which the decision in the appeal depends may be so insubstantial as not to justify further proceedings. *See* 9th Cir. R. 3-6.

Within 21 days after the dates of this order, appellant shall show cause why the orders challenged in this appeal should not be summarily affirmed. Appellees may file a reply to appellant's response within ten days after service of the response.

Appellant's failure to comply with this order will result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

CO/Pro Se

FILED

JAN 12 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 09-35760
Plaintiff - Appellant,	)	D.C. No. 1:08-cv-00078-BLW
v.	)	District of Idaho, Boise
NLRB REGION 27; et al.,	)	ORDER
Defendants - Appellees.	)	

Before: Peter L. Shaw, Appellate Commissioner.

Appellant's motion for clarification of this court's November 5, 2009 order is granted. Appellant is informed that the November 5, 2009 order limiting the scope of this appeal was issued without consideration of appellee's motion to dismiss. Appellees' motion to dismiss this appeal is denied.

Appellant's motion for an extension of time to file the opening brief is construed as a motion for extension of time to respond to this court's November 5, 2009 order to show cause. Within 21 days after the date of this order, appellant

MF/Pro Se

shall show cause why the district court's March 30 and August 13, 2009 orders should not be summarily affirmed. Appellees may file a reply to appellant's response within 10 days after service of the memorandum.

Appellant's failure to comply with this order will result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

MF/Pro Se

FILED

JAN 15 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 09-35760
Plaintiff - Appellant,	)	D.C. No. 1:08-cv-00078-BLW
v.	)	District of Idaho, Boise
NLRB REGION 27; et al.,	)	
Defendants - Appellees.	)	ORDER

On November 5, 2009, this court defined the scope of the appeal as limited to review of the March 30, 2009 and August 13, 2009 orders denying appellant's first and second motions for reconsideration. This court ordered appellant within 21 days to show cause why the appeal should not be summarily affirmed because the limited issue on appeal, as defined in the previous sentence, may be so insubstantial as not to justify further proceedings. *See* 9th Cir. R. 3-6.

On November 23, 2009, appellant filed a motion for clarification. The motion is granted as follows. Appellant shall show cause why the district court's March 30, 2009 and August 13, 2009 orders denying appellant's first and second

LN/MOATT

motions for reconsideration contained error warranting further review by this court, such that the order to show cause should be discharged and the briefing schedule reset.

Appellant shall file a response within 21 days from the date of this order. Failure to respond will result in the automatic dismissal of this appeal by the Clerk of the Court for failure to prosecute. Appellees may file a reply to appellant's response within ten days after service of the response.

FOR THE COURT:

Molly Dwyer
Clerk of Court

By: Liz Noteware
Motions Attorney/
Deputy Clerk
9th Cir. R. 27-7
General Orders/ Appendix A

FILED

APR 26 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 07-35964
Plaintiff - Appellant,	)	D.C. No. CV-06 00142-WFN
v.	)	District of Idaho, Boise
MARTIN LUCAS; et al.,	)	
Defendants - Appellees.	)	ORDER

Before: ALARCON, W. FLETCHER and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny appellant's petition for rehearing. Judges W. Fletcher and Rawlinson have voted to deny the petition for rehearing en banc. Judge Alarcon recommends that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are Denied.

FILED

MAR 11 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 07-35964
Plaintiff - Appellant,	)	D.C. No. CV-06-00142-WFN
v.	)	District of Idaho, Boise
MARTIN LUCAS, et al.,	)	
Defendants - Appellees.	)	ORDER

Before: ALARCON, W. FLETCHER and RAWLINSON, Circuit Judges.

On February 25, 2010, Appellant, Martin Bettweiser, filed a Motion and Memorandum for Clarification and Reconsideration of this Court's order dismissing his appeal for lack of appellate jurisdiction.

The motion is DENIED.

FILED

FEB 11 2010

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER,	)	No. 07-35964
Plaintiff - Appellant,	)	D.C. No. CV-06-00142-WFN
v.	)	District of Idaho, Boise
MARTIN LUCAS; LISA BUTTERWORTH; JIM SYKES; UNITED STATES POSTAL SERVICE,	)	MEMORANDUM*
Defendants - Appellees.	)	

Appeal from the United States District Court
for the District of Idaho
William Fremming Nielson, District Judge, Presiding

Submitted February 1, 2010**
Seattle, Washington

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: ALARCON, W. FLETCHER and RAWLINSON, Circuit Judges.

Martin Bettwieser, an employee of the United States Postal Service ("USPS"), appeals from the district court's order dismissing his complaint with prejudice, for failure to exhaust administrative remedies. The order also denied Bettwiesesr's motion for default judgment and overruled his objection to the United States Attorneys' Office's representation of the individually named defendants. In his opening brief, Bettwieser raised numerous issues for appeal. We dismiss this appeal for lack of subject matter jurisdiction because Bettwieser failed to exhaust administrative remedies.

Prior to filing his complaint in the district court, Bettwieser sent a request for production of documents Pursuant to the Freedom of Information Act and the Privacy Act to Lisa Butterworth, the Manager of Customer Service at the USPS branch where Bettwieser works. Jim Sykes, the Manager of Labor Relations for the Spokane District, sent a letter to Bettwieser that instructed him to direct any appeal of the response to the request for documents to the Chief Counsel of Customer Protection and Privacy of the USPS in Washington, D.C. According to the November 6, 2006 declaration of Anthony Alvaro, Chief Counsel of the USPS, no appeal was ever filed.

"Exhaustion of a parties' [sic] administrative remedies is required under the FOIA before that party can seek judicial review." *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1993).

In *Laing v. Ashcroft*, 370 F.3d 994, 1001 (9th Cir. 2004), the Ninth Circuit held that "exhaustion of administrative remedies may not be required when

(1) available remedies provide no genuine opportunity to adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question." *Id.* at 1000-01; quoting *Beharry v. Ashcraft*, 329 F.3d 51, 62 (2d Cir. 2003) (internal citations and quotation marks omitted).

Bettwieser has not demonstrated that he did not receive a genuine opportunity for adequate relief, that he would suffer irreparable injury without immediate judicial relief, that an administrative appeal would be futile, nor has he raised a substantial constitutional question.

The district court properly dismissed the action for lack of subject matter jurisdiction under Rule 12(b)(1).[1] Since there is no jurisdiction for this Court either until administrative remedies are exhausted, we will not reach any issues Bettwieser has raised in his appeal to this Court.

DISMISSED.

---

[1] While the district court's order dismissed the complaint before it with prejudice for failure to exhaust administrative remedies, the district court's order will not preclude Bettwieser from pursuing an attempt to seek an administrative remedy, if it is timely, or seeking timely judicial review of an adverse final decision. *See City of Oakland v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009) ("[F]ailure to exhaust administrative remedies is properly treated as a curable defect and should generally result in a dismissal without prejudice").

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

MARTIN BETTWIESER,	)	
	)	NO. 06-CIV-0142-
Plaintiff,	)	WFN
	)	
-vs-	)	MEMORANDUM
	)	ORDER AND
MARTIN LUCAS, LISA	)	OPINION
BUTTERWORTH, JIM SYKES,	)	
and the UNITED STATES	)	
POSTAL SERVICE,	)	
	)	
Defendants.	)	
	)	

Pending before the Court is the Government's Motion to Dismiss (Ct. Rec. 6), Plaintiff's Motion for Default Judgment (Ct.Rec. 11), and Plaintiff's Objection to U.S. District Attorney's Representation of Individual Defendants (Ct. Rec. 12). Plaintiff is proceeding pro se. Defendants are represented by Assistant United States Attorney Nicholas Woychick.

I. BACKGROUND

Mr. Bettwieser had been employed by the United States Postal Service [USPS]. After his employment was terminated, he requested certain records from his former

employer. The USPS provided some, but not all, of the requested information. On April 10, 2006, Plaintiff filed a complaint alleging that the USPS and three individually named employees violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. Plaintiff alleges that the USPS did not sufficiently comply with Freedom of Information Act and the Privacy Act because he did not receive all of the records he requested and those he did receive had been intentionally and unlawfully altered. Assistant United States Attorney Nicholas Woychick filed a response on behalf of the USPS and the individually named defendants.

The Idaho Clerk of the Court's office erroneously entered an Order of Conditional Filing causing some confusion as to the status of the case. Several motions were filed, but not all were answered. In an effort to clarify the status of the case. Judge Winmill issued an order setting deadlines for responses to all pending motions. Judge Winmill then transferred the case to this Court. In response to this Order, Plaintiff filed a response which alleged the Court's consideration of the Motion to Dismiss was premature, presumably due to concerns with sufficiency of service (Ct. Rec. 19). The Court issued an Order extending the deadline for Plaintiff to respond to the substance of the Motion to Dismiss that was met with some confusion. The Court held a scheduling hearing on July 3, 2007 in order to set the deadlines in the case and to clarify the status of the pending Motions.

In Plaintiff's Motion for Default Judgment and Objection to Representation, he contends that AUSA Woychick's representation of individual defendant's is

improper and therefore those defendants failed to timely respond. He requests that AUSA Woychick's representation be limited to the USPS. He argues that because AUSA Woychick's representation should be limited to the USPS, the individual defendants cannot benefit from his answer, necessitating a judgment in favor of Plaintiff for those defendants.

In the Motion to Dismiss Defendants contend Plaintiff failed to exhaust his administrative remedies. In support, Defendants submitted documentation showing Mr. Bettwieser's initial request, the agencies response, further communication regarding his request, and evidence of the USPS regulations regarding the appeals process. In his response, Plaintiff argues that the Defendants failed to answer his amended FOIA request. Plaintiff also alleges further violations of FOIA and the Privacy Act. However, these allegations were not made in the complaint so will not be considered unless relevant to a pending claim.

II. ANALYSIS

A. U.S. District Attorney's Representation of Individual Defendants is proper.

Plaintiff argues that his complaint alleges that the individually named defendants were somehow involved in criminal activities. Based on this assertion, he claims the US District Attorney's duty to prosecute crimes conflicts with his representation of the individual defendants. However, the US District Attorney's duties also require the AUSA to "defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned."

28 U.S.C. § 547(2). Where it is asserted that the individually named defendants were acting in accordance with their duties as employees of the Government, representation by the US District Attorney is appropriate.

In further support of suitability of AUSA Woychick defending the individually named defendants, the Court notes that individual defendants cannot be held liable for alleged civil violations of the Privacy Act. *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1340 (9th Cir. 1987). Plaintiff argues suit is appropriate based on *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, as the Plaintiff acknowledges, *Bivens* only allow suit where the federal employee engages in unconstitutional conduct. *Id.* Plaintiff does not contend that these alleged violations of FOIA and the Privacy Act damaged his constitutional rights. Since suit against the individual employees is inappropriate, they should benefit from representation from the agency. The Department of Justice is charged with defending suits on behalf of agencies, so the AUSA properly defended the individually named defendants from this suit.

B. Default judgment is not appropriate.

Plaintiff moved for a default judgment against all defendants except for the USPS. Presumably this is based on the premise that AUSA Woychick's representation of the individual defendant's was not appropriate, thus the answer filed by him is not sufficient. Rule 55 only permits a default judgment were "a party against whom a judgment for affirmative relief is sought has failed to plead or *otherwise*

defend as provided by these rules." Fed. R. Civ. P. Rule 55. Even if the representation was inappropriate, the parties made a good faith attempt to answer the pleadings. Further, since representation is in fact appropriate, the answer filed (Ct. Rec. 5) makes default judgment inappropriate.

C. **Plaintiff's failure to exhaust administrative remedies necessitates dismissal of the case.**

FOIA and the Privacy Act provide avenues for individuals to gain access to agency records. The Privacy Act requires agencies to furnish certain records upon request of an employee. 5 U.S.C. § 552a(d)(1). If an agency fails to comply with the act, the employee can sue for attorney's fees, costs of litigation, and equitable relief. 5 U.S.C. § 552a(g)(1)(B) & (g)(3). FOIA requires agencies to provide the public with copies of specifically requested agency records subject to several exceptions. 5 U.S.C. § 552.

Defendants move to dismiss the amended complaint on the basis that Plaintiff failed to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Since the Court considered matters outside the pleadings, the motion will be treated as a summary judgment motion. Fed. R. Civ. P. 12(b). The Court "must determine, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in its favor, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Canatella v. Van De Kamp,* 486 F.3d 1128, 1132 (9th Cir. 2007). Defendants argue that the Plaintiff failed to exhaust administrative remedies. Further, to the extent that Plaintiff alleges injury based on the actions of the individually named

defendants, Defendants argue that individual employees cannot be held civilly liable for violations of the Privacy Act. Both of these arguments have merit.

Both FOIA and the Privacy Act require Plaintiff to exhaust administrative remedies prior to bringing a civil suit. "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhauste, suit is premature and must be dismissed." *Reiter v. Cooper,* 507 U.S. 258, 269 (1993). "Exhaustion of a parties' administrative remedies is required under the FOIA before that party can seek judicial review." *In re Steele,* 799 F.2d 461, 465 (9th Cir. 1986). Though the Ninth Circuit has not issued an opinion regarding exhaustion in Privacy Act cases, the circuits who have had an opportunity to address the issue agree that a plaintiff must exhaust their administrative remedies prior to filing suit. See *Haase v. Sessions,* 893 F.2d 370, 373 (D.C. Cir. 1990).

In support of their Motion to Dismiss, Defendants submitted evidence of the USPS's process for exhausting administrative relief and evidence that Mr. Bettwieser received this information. According to USPS regulations, to exhaust administrative relief, an appeal must be sent to the General Counsel in Washington, DC. 39 C.F.R. § 266(4). Though Plaintiff alleges in his complaint that he exhausted administrative remedies, the specific factual allegations he proffers do not support his allegation. He alleges he submitted an appeal to Jim Sykes, the manager of Labor Relations of the Spokane District of the USPS. While this appears undisputed, he did not comply with the Postal regulations regarding where the appeal should be sent.

Mr. Bettwieser does not allege he attempted to participate in the appeal process described in the regulations. Further, General Counsel found no record of such an appeal lodged in the manner prescribed by the regulations.

In his declaration, Mr. Bettwieser implies that following the proscribed procedure would have been futile because he had appealed previous FOIA request decisions in the manner required by the regulations, but that the USPS never responded to his appeals. A plaintiff need not "exhaust administrative remedies that would be futile" to exhaust. *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir 2004). However, Mr. Bettwieser did not provide documentation supporting his assertions. Without further evidence, Plaintiff's bare assertions of futility are not enough to forego exhaustion.

Mr. Bettwieser also alleges he submitted an amended request that apparently went unanswered. An unanswered FOIA request would provide an exception to the exhaustion requirement. 5 U.S.C. § 552(a)(6)(C)(i). However, the Privacy Act contains no equivalent provision. *Pollack v. Dep't of Justice*, 49 F.3d 115, 116 n. 1 (4th Cir. 1995). The Defendants included a copy of a letter Plaintiff submitted as an amended request for information to individually named defendant, Lisa Butterworth, an employee of USPS dated February 17, 2006. Attached to her affidavit, Ms. Butterworth includes a letter she sent to the Plaintiff responding to his amended request. In response to Ms. Butterworth's letter, Plaintiff wrote to Jim Sykes on March 2, 2006, addressing several concerns he has regarding the information he received. In the complaint the Plaintiff characterizes this letter as an appeal, but in his response to

the Defendants' Motion he characterizes it as an amended FOIA request. If it is a FOIA request, the USPS was required to respond. It is not clear from the evidence submitted whether the USPS responded to this letter.

Plaintiff argues that the USPS's failure to respond to the letter sent to Mr. Sykes amounts to a violation of FOIA. This is only true if the letter sent to Mr. Sykes constitutes a separate FOIA request. The USPS regulations do not mandate any particular form for requests for information:

> To permit expeditious handling and timely response in accordance the provisions of this part, a request to inspect or to obtain a copy of an identifiable Postal Service record shall be in writing and bear the caption "Freedom of Information Act Request" or otherwise be clearly and prominently identified as a request for records pursuant to the Freedom of Information Act. A request shall be clearly and prominently identified as such on the envelope or other cover. Other requests for information will be considered informal requests and will be handled as expeditiously as practicable but not necessarily within the time limitations set forth in § 265.7(b). An informal request will be granted or denied according to the substantive rules in § 265.6, if found to be a request for a record. 39 C.F.R. § 265.7(a).

Since the subject line clarified that his request related to a FOIA request, presumably it would at least be considered an information request. He asks for a "modified response" to his initial request. His demands were: "1. To inspect and copy all documents requested on Jan 7, 2006 and or *(sic)*

which were supplied on February 8, 2006; 2. To inspect and copy a leave slip requested in that letter and request, of February 17, 2006; 3. A meeting with mutually agreeable time to identify and clarify items." Declaration of Martin Bettwieser, Exhibit B, Ct. Rec. 29. The first request clearly repeats the initial FOIA request, and thus is not a separate request requiring an answer. Regarding the second item, it is not clear that Mr. Bettwieser requested the denied leave slip in the initial FOIA request. However, he clearly requested it in the letter submitted to Ms. Butterworth on February 17, 2006. She addressed this request in her response to him. Since he received a response, this item does not qualify for the FOIA exception to exhaustion. The last item, a request for a meeting, is not statutorily mandated, and thus failure to respond to this request does not violate FOIA or the Privacy Act. Thus, even if the letter to Jim Sykes went unanswered, the letter does not meet the FOIA exception to exhaustion. Further, since the specific requests he made appear to fall under the Privacy Act, failure of the USPS sto respond does not satisfy the exhaustion requirement.

Since the USPS responded to the Plaintiff's FOIA request, Plaintiff did not pursue an appeal according to the USPS regulations, and an appeal would not have been futile, Plaintiff failed to exhaust. All of Plaintiff claims arise from the Plaintiff's unexhausted FOIA/Privacy Act requests. Thus, Plaintiff's complaint is not timely.

Based on the foregoing, the Court finds that AUSA Woychick's representation of the individual defendants is proper, default judgment is inappropriate, and the Plaintiff failed to state a claim for which relief can be granted. Accordingly,

IT IS ORDERED that:

1. Plaintiff's Objection to U.S. District Attorney's Representation of Individual Defendants, filed 2006, **Ct. Rec. 12, is OVERRULED.**
2. Plaintiff's Motion for Default Judgment, filed, 2006, **Ct. Rec. 11, is DENIED.**
3. Defendants' Motion to Dismiss, filed 2006, **Ct. Rec. 6, is GRANTED.**
4. The Complaint is **DISMISSED** with prejudice.

The Clerk of Court is directed to file this Order, Provide copies to counsel and pro se Plaintiff, and thereafter shall **CLOSE** this file.

DATED this 27th day of July, 2007.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATED
07-26 DISTRICT JUDGE

UNITED STATES DISTRICT COURT
For the District of Idaho

MARTIN BETTWIESER,	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
NLRB Region 27	)	
	)	
UNITED STATES POSTAL SERVICE with officers. MARTIN LUCAS, JIM LAMBERT, DAN FRAZIER,	)	Case No. 08-CV-78-S-CWD
	)	
IDAHO RURAL LETTER CARRIERS ASSOCIATION, With officers: RICHARD DRAPER, SHARON ATKINS, KEITH KEHLER.	)	
	)	
Defendants	)	

ORDER DENYING PLAINTIFF'S MOTIONS FOR DEFAULT JUDGMENT AND GRANTING THE DEFENDANTS' MULTIPLE MOTIONS TO DISMISS

I. Background

This matter comes before the Court on innumerable motions by the Plaintiff, including motions for default judgment against each of the named defendants, motions to

strike various filings by the Defendants, and even motions to grant motions to strike. Also before the Court are motions to dismiss by the U.S. Postal Service and its named officers ("Federal Defendants"); the Idaho Rural Letter Carriers and its named officers ("Union"); and the National Labor Relations Board, Region 27 ("NLRB").

The case stems originally from a rambling and convoluted complaint in which Plaintiff, a rural letter carrier, appears—if the document is read very liberally—to attempt to state claims for breaches of the collective bargaining agreement between the Postal Service and the Union; breach of the Union's duty of fair representation; due process violations; and failure of the NLRB to properly investigate and prosecute these alleged violations. It is not entirely clear from the complaint or from the many other filings in this case what alleged facts these claims arise from. However, it would appear that Plaintiff Bettwieser believes the Federal Defendants withheld work from him; did not offer him choice assignments; made threats of workplace violence; and made fun of him for his various concerns. He apparently tried to raise these grievances with both his postal service management and the Union, which failed to act on them to Plaintiff's satisfaction.

Plaintiff ultimately seeks monetary damages for "unpaid and underpaid settled grievances," compensation for not allowing the Plaintiff higher level work, and for injunctive relief against "further violations of the labor contract" between the Postal Service and the Union.

II. Legal Issues

In their motions to dismiss, the Federal Defendants, Union and NLRB all allege defects in the service of the complaint, which they assert require dismissal under Fed. R. Civ. P. 12(b)(5). Defendants also assert that Plaintiff's complaint fails to state a claim on which relief may be granted; that the claims against the Federal Defendants fail due to sovereign immunity; that this Court does not have jurisdiction to review the NLRB's decision not to further investigate or prosecute Mr. Bettwieser's complaints; and that the Union is not the proper defendant in this matter, but that its national parent organization should have been named instead.

Further, Plaintiff has submitted numerous motions for default judgment grounded in the defendants' failure to answer his complaint, as well as motions to strike various filings by defendants.

III. Standard of Review

A motion to dismiss for failure to state a claim for relief under FED. R. CIV. P. 12(b)(6) should be granted only if, accepting all of the allegations of material fact as true, and construed in the light most favorable to the nonmoving party, the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The plaintiff, however, must plead with specificity sufficient factual allegations to support the claim on their face; vague and conclusory allegations fail to state a claim

for relief. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir. 2008).

The Court notes that it must "liberally construe the 'inartful pleading' of *pro se* litigants," such as Plaintiff Bettwieser. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (citing *Boag v. MacDougall*, 545 U.S. 364, 365, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982)). However the Court must not adopt the role of advocate for a *pro se* party. *Franklin v. Murphy*, 745 F.2d 1221, 1229 (9th Cir. 1984). Where dismissal of a *pro se* litigant's compliant is at issue, the Court must give leave to amend before dismissing unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam)).

IV. Legal Analysis

A. The Federal Defendants' Motion to Dismiss

The Federal Rules of Civil Procedure state: "To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee." Fed. R. Civ. P. 4(i)(2). The rule clearly requires personal service on the government. Likewise, Rule 4(i)(3) requires a plaintiff suing a United States employee in his individual capacity to serve both the United States and the employee in accordance with Rule 4(e). Rule 4(e) allows for personal service of the summons and complaint, leaving a copy of the same at the defendant's residence, delivery to an authorized agent of the

defendant, or by any means authorized under the law of the state in which service takes place. Fed. R. Civ. P. 4(e).

Defendant cites Idaho R. Civ. P. 4(g) for the proposition that service by certified mail is permissible. However, Rule 4(g) deals not with service of a complaint, but with return of service, and it is clear from earlier sections of the rule that service of a complaint by mail is only allowed in limited circumstances such as when it is served upon the registered agent of a domestic of foreign corporation. Idaho R. Civ. P. 4(d)(4). Idaho Rule 4(d)(2) specifies the requirements for service on an individual; its requirements are essentially the same as those provided for in Federal Rule 4. Service on an individual by certified mail does not comport with Rule 4(e) or the relevant rules of state civil procedure. *Ivy v. Mason*, 30 F. Supp. 2d. 1268, 1271 (D. Idaho 1998).

It is undisputed that Plaintiff Bettwieser attempted to serve the Federal Defendants via certified mail. Further, the Federal Defendants have submitted an affidavit by Robyn Austin, an administrative clerk with the US. Attorney's office for the District of Idaho, along with a copy of a page from that office's "Service of Process Log" showing that Mr. Bettwieser's complaint was delivered to that office by certified mail on May 30, 2008. (Dkt. 53). It is clear that service of process was not perfected as to the Federal Defendants, and Plaintiff's complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process.

The Court notes that additional issues raised by the Federal Defendants also require dismissal, most notably sovereign immunity since a suit against a federal employee in his official capacity is essentially a suit against the United

States. *See Gilbert v. DaGrossa*, 756 F. 2d 1455, 1458 (1985). Plaintiff has not asserted, nor do the Federal Defendants admit, that the United States has waived its sovereign immunity in this case. Consequently, even if Plaintiff Bettwieser had properly served the United States and the Federal Defendants in their official capacity, this Court would still be forced to dismiss his complaint, at least as to the Federal Defendants in their official capacity.

Plaintiff's complaint against the Postal Service and its employees in their official capacity also fails under Rule 12(b)(6) for failure to state a claim on which relief can be granted, due to the inappropriateness of a constitutional claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). First, where Congress has created a comprehensive remedial scheme to deal with such disputes, a *Bivens* claim cannot be used to supplement that scheme. *Pereira v. U.S. Postal Svc.*, 964 F.2d 873, 875 (1992) (dismissing a request for a temporary injunction to stop alleged workplace harassment where a union grievance system existed to handle such disputes). Second, a United States agency may not be sued under *Bivens;* only individual defendants may be held liable under that doctrine. *FDIC v. Myers*, 510 U.S. 471, 484-85 (1994).

In this case, Plaintiff Bettwieser claims violations of his right to due process against the Federal Defendants. The Court notes that it is not entirely clear from Plaintiff Bettwieser's complaint whether he intends to state claims against the named Postal Service employees in their individual or official capacity or both, though in later filings he refers to both types of claims. To the extent Plaintiff's *Bivens* due process claims may be read to apply to the Federal Defendants in their individual capacity, it is clear that the National Labor Relations Act contemplates a

comprehensive remedial scheme by which postal workers may address their claims, thus precluding the instant action.

Finally, Rule 12(b)(6) would require dismissal of Plaintiff's due process claims even if a *Bivens* action was otherwise appropriate. Though this Court is mindful of its duty to liberally interpret the pleadings of a *pro se* litigant, more is required to state a claim than mere conclusory statements and allegations. Plaintiff in this case has failed to raise his right to relief above "mere speculation" and has thus fallen short of his Rule 8 requirements.

B. The Union's Motion to Dismiss

As was the case with the Federal Defendants, it is undisputed that Plaintiff Bettwieser did not perfect service on the Union or its named officers. Although Plaintiff argues that his method of service—certified, restricted delivery mail—should be interpreted by this Court as sufficient, it is clear from the face of both Federal and Idaho Rule 4 that certified mail is not an allowed method of service of process. *Ivy*, 30 F. Supp. 2d at 1271. Consequently, Plaintiff's complaint must be dismissed for insufficient service of process.

In its Motion to Dismiss, the Union raises additional concerns regarding this Court's jurisdiction in this case. 39 U.S.C. § 1208 provides the jurisdictional basis for a federal court to hear a lawsuit by a U.S. Postal Service employee against a labor organization. However, the statute allows for suits only where a valid collective bargaining agreement exists between the two parties. *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Where a local chapter of a national labor union is not an actual party to the collective bargaining agreement between the employer and the national

union, jurisdiction is not proper. *See Baker v. Newspaper & Graphic Communications Union*, 202 U.S. App. D.C. 156, 165 (D.C. Cir. 1980). In this case, the collective bargaining agreement at issue exists between the postal service employees and the national chapter of the Rural Letter Carriers Association Consequently, this Court does not have jurisdiction over the local chapter named by Plaintiff Bettwieser. Nor may liability lie against the named Union officials in this case, since they are not parties to the collective bargaining agreement at issue. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (U.S. 1962).

Additionally, 29 U.S.C. § 160(b) contemplates a six month statute of limitations on claims for breach of a union's duty of fair representation. *See also DelCostello v. Int'l Bthrhd of Tmstrs*, 462 U.S. 151, 169-72 (1983). The statute of limitations begins to run when a plaintiff knew or should have known of the defendant's alleged wrongdoing. *Stone v. Writers Guild of America West, Inc.*, 101 F.3d 1312, 1314 (9th Cir. 1996). Plaintiff's complaint allege, at least in part, wrongdoings by Union officials, who supposedly "reduced" or "failed to secure" compensation for employment related grievances in December 2006 and July 2007.[1] (Complaint §§ XII(a), XIV(b).) Plaintiff's complaint was filed in February 2008, which is clearly outside of the statute of limitations.

C. The NLRB's Motion to Dismiss

This Court has limited jurisdiction to review actions taken by the NLRB. *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 118-19 (1987)

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[1] The Court is unable to determine, as a result of Plaintiff's vaguely worded complaint, whether he alleges other claims that may have occurred within the six month statute of limitations.

("UFCW"). It may, for instance, review a final order of the NLRB issued after a formal adjudication by an NLRB administrative law judge. 29 U.S.C. §§ 160(e) and (f). However, it cannot review an earlier decision not to investigate or prosecute a complaint by an employee. *UFCW*, 484 U.S. at 129-30 ("the General Counsel's decision not to file a complaint is not reviewable" either in the courts of appeals or in a federal district court under the Administrative Procedures Act). Rather, the General Counsel of the NLRB "shall have the final authority, on behalf of the Board, in respect of the investigation of charges and issuances of complaints." 29 U.S.C. § 153(d); *Int'l Ass'n of Machinists & Aerospace Wrkrs, AFL-CIO v. Lubbers*, 681 F.2d 598, 600 (9th Cir. 1982) ("Appellant's assault on the non-reviewability of the General Counsel's prosecutorial decisions is foreclosed by the clear line of contrary authority.").

Plaintiff Bettwieser's vague and conclusory complaint alleges a failure by the NLRB to "deal with grievances that are injurious to the complainant and others by not fully investigating and collecting the facts, not abiding by the National agreement and laws, not fully completing the necessary paperwork to gain a full understanding of management and the unions (sic) position on matters," etc. Such alleged failures to investigate or prosecute are just the sort of issues over which this Court clearly lacks jurisdiction. Consequently, Plaintiff's complaint against the NLRB must be dismissed.

D. Plaintiff's Motions for Default Judgment and Motions to Strike

Throughout the pendency of this action, Plaintiff attempted to gain default judgment over the defendants as a

result of their failure to answer his complaint. However, default judgment is not appropriate here because, as previously discussed, Plaintiff failed to properly serve his complaint.

Plaintiff has also filed numerous motions to strike various filings by the Defendants. Fed. R. Civ. P. 12(f) allows for motions to strike pleadings where they state "an insufficient defense" or contain "redundant, immaterial, impertinent, or scandalous matter." The federal rules define a pleading as a complaint, answer to complaint, answer to a counterclaim, answer to a cross-claim, third party complaint, third party answer, or a court-ordered reply to answer. Fed. R. Civ. P. 7(a). A motion to dismiss is not a pleading. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000). Consequently, Plaintiff's various motions to strike must be denied.

E. Leave to Amend

When dealing with *pro se* litigants, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *Noll*, 809 F.2d at 1448. In this case, Plaintiff's complaint fails for a long list of reasons, including improper service of process, sovereign immunity, lack of jurisdiction, and an expired statute of limitations, etc. None of these infirmities can be cured by amendment. Consequently, leave to amend is inappropriate.

F. Sanctions

When faced with a vexatious litigant, a federal district court may impose a variety of carefully tailored sanctions to

prevent abusive and frivolous lawsuits. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). Before doing so, however, the litigant must have a history of filing abusive lawsuits. See *id.* Further, the conditions or sanctions imposed cannot be so burdensome as to deny a litigant meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, (1977).

The Court notes that this is the second action filed by Plaintiff Bettwieser in Idaho federal court. *See Bettwieser v. Lucas*, 2007 WL 2187057 (D. Idaho July 27, 2007). His previous action alleged failures on the part of the Postal Service and three individually named employees to comply the Freedom of Information Act and the Privacy Act regarding requests for information made by Bettwieser relating to his termination from employment. That action was dismissed for failure exhaust his administrative remedies, and for failure to state a claim upon which relief could be granted.

It is not entirely clear whether the instant case involves the same nucleus of facts as *Bettwieser v. Lucas*, however, the Court observes an apparent trend by Mr. Bettwieser to seek relief in federal court from a variety of perceived workplace wrongs. This case marks the second time Mr. Bettwieser has faced dismissal with prejudice for failing to satisfy a variety of threshold issues. The Court cannot say, given the record before it, that sanctions are currently required to prevent vexatious filings by the Plaintiff. It nonetheless notes that he is well on his way to establishing an "abusive and lengthy history" of vexatious litigation and hereby warns that sanctions, including requiring Mr. Bettwieser to retain an attorney or seek leave of court before filing further employment related lawsuits, may eventually be necessary if his present trend continues.

V. Conclusion

Although this Court, mindful of its enhanced duties when confronting a *pro se* litigant, endeavored at all times to liberally construe Plaintiff Bettwieser's complaint, it is abundantly clear that it contains numerous fatal flaws requiring dismissal. First and foremost, Plaintiff failed to properly serve the individual Federal Defendants, the Assistant U.S. Attorney for the District of Idaho, or the Attorney General of the United States. Likewise, he failed to properly serve the individual Union defendants and the Union itself. Consequently, pursuant to Fed. R. Civ. P. 12(b)(5), Plaintiff Bettwieser's complaint must be dismissed as to the Union, its individual defendants, and all Federal Defendants. It is also clear that this Court lacks jurisdiction to hear disputes regarding the NLRB's alleged failure to investigate or prosecute Plaintiff's original grievances, and that Plaintiff's attempt to state a cause of action under *Bivens* is misplaced.

Plaintiff's multiple Motions for Default Judgment and Motions to Strike are DENIED; Defendant's Motions to Dismiss are GRANTED; and Plaintiff's Complaint is DISMISSED with prejudice.

DATED this 15th day of December, 2008.

Computer generated signature
Honorable William F. Downes
Chief United States District Judge
Sitting by Special Designation

UNITED STATES DISTRICT COURT
For the District of Idaho

MARTIN BETTWIESER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
NLRB Region 27	)	
	)	
UNITED STATES POSTAL SERVICE with officers: MARTIN LUCAS, JIM LAMBERT, DAN FRAZIER,	)	Case No. 08-CV-78-S-CWD
	)	
IDAHO RURAL LETTER CARRIERS ASSOCIATION, With officers: RICHARD DRAPER, SHARON ATKINS, KEITH KEHLER.	)	
	)	
Defendants.	)	

ORDER TERMINATING CASE

In accordance with the Order filed December 16, 2008, IT IS HEREBY ORDERED, ADJUDGED and DECREED that this case is hereby dismissed with prejudice.

DATED this 17th day of December, 2008.

Computer generated signature
Honorable William F. Downes
Chief United States District Judge
Sitting by Special Designation

UNITED STATES DISTRICT COURT
For the District of Idaho

MARTIN BETTWIESER,	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
NLRB Region 27	)	
	)	
UNITED STATES POSTAL	)	Case No. 08-CV-78-
SERVICE with officers	)	S-BLW
MARTIN LUCAS, JIM	)	
LAMBERT, DAN FRAZIER,	)	
	)	
IDAHO RURAL LETTER	)	
CARRIERS ASSOCIATION,	)	
With officers RICHARD	)	
DRAPER, SHARON ATKINS,	)	
KEITH KEHLER	)	
	)	
Defendants	)	

ORDER DENYING MOTION FOR RECONSIDERATION

This matter comes before the Court on *pro se* Plaintiff Martin Bettwieser's Motion for Reconsideration, wherein he seeks reversal of this Court's order dismissing his case for a variety of jurisdictional and process-related issues. Also before the Court is Plaintiff's Motion to Reimburse Witness Fees. Having considered Plaintiff's motion, Defendant Idaho

Rural Letter Carrier's Association's response thereto, and Plaintiff's untimely reply brief, the Court FINDS and ORDERS:

1. **Plaintiff's Request for Additional Time to File a Reply Brief**

Having reviewed numerous filings by Plaintiff, the Court finds that additional briefing by the Plaintiff would not be helpful. Plaintiff's request for additional time to reply to Defendant IDRLCA's is accordingly DENIED.

2. **Plaintiff's Motion for Reconsideration**

Plaintiff apparently seeks reconsideration under FED R. CIV. P. 59(e), which allows motions to alter or amend judgments. The Ninth Circuit has stated that Rule 59(e) amendments are appropriate where a district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). However, no such circumstances are present here.

Plaintiff asserts that as the NLRB was properly served with his complaint, this Court committed error in dismissing the agency from the suit. However, Mr. Bettwieser misunderstands the basis for this Court's dismissal of the NLRB, which was not executed due to insufficient service of process, but due to this Court's lack of jurisdiction to review actions taken in the NLRB General Counsel's prosecutorial discretion. *See Int'l Ass'n of Machinists & Aerospace Wrkrs, AFL-CIO v. Lubbers*, 681 F.2d 598, 600 (9th Cir. 1982).

The remainder of Plaintiff's arguments consist of nothing more than a reiteration of his earlier argument that certified mail constitutes an acceptable means of service on all defendants, since Fed. R. Civ. P. 4(i) contemplates service be certified mail on officers of the United States. However, certified mail is not an acceptable means of personal service on individuals that are not officers of the United States, or that are officers of the United States sued in their individual capacities as here. *See Ivy v. Mason,* 30 F. Supp. 2d. 1268, 1271 (D. Idaho 1998) (discussing Idaho and Federal Rules of Civil Procedure).

Finally, Mr. Bettwieser does not address the fact that he improperly named the local branch of the Idaho Rural Letter Carriers' Association rather than the national union, or that his complaint falls outside the sixth month statute of limitations period on claims for breach of a union's duty of fair representation. Consequently, he has failed to show how this Court's order dismissing his complaint with prejudice was in error, and his Motion for Reconsideration must be and is DENIED.

3. Motion to Reimburse Witness Fees

Mr. Bettwieser also seeks reimbursal for witness fees he accrued as a result of subpoenas issued in preparation for the November 9, 2008 hearing on the Defendants' multiple Motions to Dismiss. However, those subpoenas were quashed because the very nature of a hearing on a Fed. R. Civ. P. 12 motion does not allow for the introduction of witness testimony or other evidence. While the Court gives due deference to Mr. Bettwieser's *pro se* status, it is not required to serve as his advocate, nor to keep him from

issuing ill-advised subpoenas. Consequently, his Motion to Reimburse is DENIED.

4. Prohibition of Further Filings

Mr. Bettwieser is reminded that this Court previously prohibited him from filing employment related lawsuits without first seeking leave of court or retaining an attorney. Although the Court did not prohibit him from filing additional motions in this case, it does so now subject to the same conditions contained in this Court's order dismissing his case.

It is so ORDERED.

DATED this 30th day of March, 2009.

Computer generated signature
Honorable William F. Downes
United States District Judge

UNITED STATES DISTRICT COURT
For the District of Idaho

MARTIN BETTWIESER, Plaintiff, vs. UNITED STATES POSTAL SERVICE, with officers: MARTIN LUCAS, JIM LAMBERT, DAN FRAZIER IDAHO RURAL LETTER CARRIERS ASSOCIATION, With officers: RICHARD DRAPER, SHARON ATKINS, KEITH KEHLER. Defendants.	)	Case No. 08-CV-78-S-CWD

ORDER DENYING MOTION TO RECONSIDER AND DENYING MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

This matter comes before the Court on Plaintiff's Motion to Alter, Amend, and Reconsider, as well as his Motion to Extend [Time] to File Notice of Appeal. Having considered Plaintiff's motions, and considering itself in all respects fully advised and informed, the Court hereby FINDS and ORDERS:

Though it is not explicitly structured as such, Plaintiff's Motion to Alter, Amend and Reconsider essentially requests this Court to reconsider its ruling on a *previous order denying reconsideration* of the Court's order dismissing Plaintiff's complaint. In the Court's previous order denying reconsideration, it prohibited Plaintiff from filing additional motions in this case. Plaintiff's instant motion for reconsideration flagrantly ignores that prohibition. Further, no grounds exist for the Court to reconsider its prior rulings. Plaintiff's Motion to Amend, Alter, and Reconsider is accordingly DENIED.

Additionally, no valid grounds exist on which to extend the deadline for filing a notice of appeal in this case. The Court's order dismissing Plaintiff's complaint was entered on December 15, 2008. In the ensuing months, Plaintiff has filed numerous baseless motions for reconsideration rife with citations to inapplicable case law instead of filing a notice of appeal. Plaintiff's motion for an extension of time is also DENIED.

The Clerk of Court for the District of Idaho is hereby directed that no additional motions may be filed in this case.

It is so ORDERED.

DATED this 12th day of August, 2009.

Personally signed

United States District Judge

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

August 20, 2010

Molly C. Dwyer
Clerk of the Court

No.: 09-35760
D.C. No.: 1:08-cv-00078-BLW
Short Title: Martin Bettwieser v. NLRB Region 27, et al

Dear Appellant:

We have received your recent transmittal to this office. The transmittal being returned back to you per Court's order filed July 8, 2010. Copy of Court's order attached.

FILED

JUL 08 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN BETTWIESER, Plaintiff - Appellant, v. NLRB REGION 27; et al., Defendants - Appellees.	)	No. 09-35760 D.C. No. 1:08-cv-00078-BLW District of Idaho, Boise ORDER

Before: B. FLETCHER, FISHER and M. SMITH, Circuit Judges.

Appellant's motion for clarification of the court's April 14, 2010 order summarily affirming the district court's post judgment orders is granted in part. Pursuant to the November 5, 2009 order, the scope of the court's review was limited to the review of the district court's August 13, 2009 and March 30, 2009 orders denying appellant's motions for reconsideration. The court reviewed the record of the district court proceedings in this action, which is available for electronic review on the PACER system, and all filings by appellant in this court in this appeal. No transcripts were

necessary because there were no hearings involved in the resolution of appellant's post-judgment motions. Court rules permit the court to summarily affirm an appeal prior to the filing of an opening brief if the appellant is given notice and an opportunity to respond, both of which were provided in this appeal. *See* Ninth Circuit Rule 3-6.

To the extend appellant seeks reconsideration of the court's April 14, 2010 order, such relief is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

SVG/Pro Se

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

RECEIVED
Molly C. Dwyer
Clerk of Appeals
U.S. Court of Appeals
Aug. 19 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN BETTWIESER, Plaintiff, Appellant	)	
vs.	)	Case No. 09-35760
NLRB Region 27	)	D.C. No. 1:08-cv 00078-BLW
UNITED STATES POSTAL SERVICE with officers: MARTIN LUCAS, JIM LAMBERT, DAN FRAZIER,	)	AMENDED MOTION TO EXTEND TIME TO FILE PETITION
IDAHO RURAL LETTER CARRIERS ASSOCIATION, With officers: RICHARD DRAPER, SHARON ATKINS, KEITH KEHLER. Defendant's/Respondents	)	FOR REHEARING EN-BANC

The Appellant Martin Bettwieser moves the court to extend the time to file his petition for rehearing Enbanc 21

days to September 13, 2010 pursuant to F.R.A.P. *C.ir. Rule 26(b) and 40(a)(1)* and supporting declaration. The deadline for filing the petition is August 23, 2010.

Dated the 17 day of August, 2010

Personally signed

Martin Bettwieser

DECLARATION OF MARTIN BETTWIESER

I Martin Bettwieser declare and state the following to be true and correct and have personal knowledge under penalty of perjury.

1. That I am the Plaintiff and Appellant in this case and am over the years of 18 years of age.
2. That I am a pro- se litigant in this action and have limited time and resources to research and submit pleadings with the courts and have full time employment which further limits the time and the libraries have limited hours due to budget cuts.
3. That I wish to due a full brief and not a limited one which requires substantial time and that there has been family issues and vaction time that has further limited the time to complete the briefing for the petition.
4. That I estimated that the requested time of an additional 21 days would be needed due to the upcoming and holidays and vacation time

Dated this 13th day of August, 2010

Personally signed

_____

Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused and true and correct copy of the AMENDED MTION TO EXTEND TIME TO FILE PETITION FOR HEARING EN-BNC with supporting DECLARATION to served by pre-paid first class mail on the 17th day August, 2010 to the following:

Personally signed

Martin Bettwieser

Robert Grisham
U.S. Attorney's Office
Washington Group Plaza IV
800 Park Blvd. Suite 600
Boise, Idaho 83712